No. 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

STEVE NELSON,
Respondent

Certiorari to Supreme Court of Pennsylvania

REPLY BRIEF FOR PETITIONER

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ARGUMENT IN REPLY.

I.

The case of *Houston* v. *Moore*, 18 U. S. (5 Wheat) 1 (1820), quoted upon pages 29-34 of respondent's brief, is clearly not adverse. It involved the construction and constitutionality of Section 21 of the Pennsylvania Act of March 28, 1814, P. L. 319, which provided:

> "Each and every non-commissioned officer and private of the militia, who shall have neglected or refused to serve when called into actual service, in pursuance of an order or requisition of the president of the United States, shall be liable to the penalties defined in the act of the congress of the United States, passed the twenty-eighth day of February, one thousand seven hundred and ninety-five: that is to say, Each and every non-commissioned officer or private having so offended, shall forfeit a sum not exceeding one year's pay nor less than one month's pay, to be determined and adjudged by a court martial, and shall be liable to be imprisoned by a like sentence, on failure of payment of the fines adjudged, for one calendar month for every five dollars of such fine, or to any penalty which may have been prescribed since the date of the passage of the said act, or which may hereafter be prescribed by any law of the United States" (p. 338).

The defendant Houston, a private enrolled in the Pennsylvania militia, was tried under this section of the Pennsylvania Statute, and convicted and sentenced to pay a fine.

He brought an action of trespass in a Court of Common Pleas in Pennsylvania against a deputy marshal for making a levy on his property, in order to collect the fine.

Judgment for the defendant was affirmed by the Supreme Court of Pennsylvania. (See *Moore* v. *Houston*, 3 S. & R. 169, note at end of opinion on page 198.)

This Court by a vote of five to two affirmed the judgment.

In the majority opinion, Mr. Justice Washington said:

"Upon the whole, I am of opinion, after the most laborious examination of this delicate question, that the state court-martial had a *concurrent jurisdiction* with the tribunal pointed out by the acts of congress, to try a militia-man who had disobeyed the call of the president, and to enforce the laws of congress against such delinquent; and that *this authority will remain* to be so exercised, until it shall please congress to *vest it exclusively elsewhere*, or until the state of Pennsylvania shall withdraw from their court-martial the authority to take such jurisdiction. At all events, this is not one of those clear cases of repugnance to the constitution of the United States, where I shall feel myself at liberty to declare the law to be unconstitutional; * * *" (32). (Emphasis supplied.)

In the concurring opinion, Mr. Justice Johnson said:

"*Why may not the same offence be made punishable both under the laws of the states, and of the United States? Every citizen of a state owes a double allegiance; he enjoys the protection and participates in the government of both the state and the United States.* It is obvious, that in those cases in which the United States may exercise the right of exclusive legislation, it will rest with congress to determine whether the general government shall exercise the right of punishing exclusively, or leave the states at liberty to exercise their own discretion. But where the United States cannot assume, or where

they have not assumed, this exclusive exercise of power, I cannot imagine a reason why the states may not also, if they feel themselves injured by the same offence, assert their right of inflicting punishment also" (33-34).

"* * * the court martial by which the plaintiff in error was tried, was acting wholly under the authority of state laws, punishing state offences" (45). (Emphasis supplied.)

In his dissenting opinion, Mr. Justice Story construed the Act of Congress of 1895 as giving a court martial under the statute the exclusive authority to try such cases. Mr. Justice Story said:

"When, then, a court-martial is spoken of in general terms in the act of 1795, the reasonable interpretation is, that it is a court-martial to be organized under the authority of the United States—a court martial whom congress may convene and regulate. There is no pretence to say, that congress can compel a state court-martial to convene and sit in judgment on such offence. Such an authority is nowhere confided to it by the constitution. Its power is limited to the few cases already specified, and these most assuredly do not embrace it; for it is not an implied power, necessary or proper to carry into effect the given powers" (66-67).

"Upon the whole, with whatever reluctance, I feel myself bound to declare, that the clauses of the militia act of Pennsylvania now in question are repugnant to the contitutional laws of congress on the same subject, and are utterly void; * * *" (75-76).

This decision supports the position of the petitioner, not the respondent. The case at bar, however, is readily distinguishable.

In *Houston* v. *Moore, supra*, the Legislature aimed to aid the *President* in enforcing a *statute of Congress*. In the case at bar, Pennsylvania is enforcing a statute of the *Legislature of Pennsylvania*.

Pennsylvania is not seeking power to try and sentence for violation of an Act of Congress. The respondent was convicted of a crime created by a *State statute*.

A long line of decisions of this Court has held unequivocally that the same act may be a crime against the government of the United States and also a crime against the government of a State. The act may be the same in both cases but the crimes are separate and different.

The italicized passages from the opinions of Justices Washington and Johnson clearly contradict the statement in Respondent's brief (pp. 34-35) that:

> "All the members of the Court agreed that identical state legislation would have to be deemed superseded in the absence of affirmative consent by Congress to the sharing of its jurisdiction."

In *Claflin* v. *Houseman, Assignee*, 93 U. S. 130 (1876), Mr. Justice Bradley similarized the effect of the decision in the *Houston* case as follows:

> "It was decided that the court had jurisdiction of the offence, having been constituted, in fact, to enforce the laws of the United States which the State legislature had reenacted. But the decision (which was delivered by Mr. Justice Washington) was based upon the general principle that the State Court had jurisdiction of the offence, irrespective of the authority, State or Federal, which created it. Not that Congress could confer jurisdiction upon the State courts, but that these courts might exercise jurisdiction on cases authorized by laws of the State, and not prohibited by the exclusive jurisdiction of the Federal courts" (141).

While the *Houston* case supports the position of the petitioner, in the case at bar it goes further than it is necessary to argue in the case at bar.

In *License Cases*, 46 U. S. (5 How.) 504 (1847), Mr. Chief Justice Taney said:

> "It may be well, however, to remark, that in analogous cases, where, by the constitution of the United States, power over a particular subject is conferred on Congress without any prohibition to the States, the same rule of construction has prevailed. Thus, in the case of *Houston* v. *Moore*, 5 Wheat., 1, it was held that the grant of power to the federal government to provide for organizing, arming, and disciplining the militia did not preclude the States from legislating on the same subject, provided the law of the State was not repugnant to the law of Congress" (584).

Since the dissenting opinion of Mr. Justice Story in *Houston* v. *Moore*, this court has rendered a multitude of decisions which have established principles governing a conflict between federal and state legislation, and among them, the following:

(1) Beginning with *Sinnot* v. *Davenport*, 63 U. S. (22 How.) 227 (1859). A statute enacted in the exercise of the police power of a state is superseded by an Act of Congress only where the conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together. See decisions in Petitioner's brief (pp. 40-43).

(2) the same act may be declared a crime by an act of Legislature and an Act of Congress, and will become an offense against the state and also the United States. See decisions in Petitioner's brief (pp. 38-39; 44-47; 63-65).

In *United States* v. *Lanza*, 260 U. S. 377 (1922), this principle was stated by Mr. Chief Justice Taft, as follows:

"We have here two sovereignties deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other" (382).

II.

In its brief heretofore filed (pp. 40-47) the Commonwealth has pointed out that the decisions cited in the majority opinion of the court below involves statutory or administrative regulations of the Federal Government and the state government respectively.

Such statutes would usually provide a penalty, but the substantive provision was the regulation and the penalty was only ancillary thereto, to aid the compelling of obedience to the regulations. In the Smith Act and the Pennsylvania Sedition Act, the substantive provision is the crime itself. The statute merely defines the crime and prescribes the penalty and does nothing more. No regulations which might conflict are provided. Each statute affords the simple example of the government making a crime of an act which might destroy its existence. Each statute creates a crime against the particular sovereign and does not conflict with the statute of the other, or interferes with its enforcement.

In a long line of decisions this court holds that the same act may violate the separate statutes of the United States and a state and each government may prosecute and punish the act. In these cases, the question of supersession has not been found. In *Hines* v. *Davidowitz*, each statute provided a program or system for the registration of aliens: see quotations in Commonwealth's brief (pp. 45-49).

In criminal statutes the legislature does not regulate or prescribe rules for a business or other activity. It simply prohibits a specific act and makes the doing of this act a crime.

Two sovereigns—the United States and a state may prohibit a given act and the crimes are separate—one against the United States and the other against the state.

In the case at bar, each sovereign has enacted a statute prohibiting the advocating of the overthrow of the government by force or violence. Each sovereign is exercising its power of self-preservation—to preserve its very existence. It is not *regulating* the conduct of a business or other activity.

III.

BOTH IN THE INDICTMENT AND IN THE EVIDENCE ACTS AGAINST PENNSYLANIA WERE CHARGED.

In the majority opinion, Mr. Justice Jones also said:

> "* * * Out of all the voluminous testimony, we have not found, nor has anyone pointed to, a single word directed against the Government of Pennsylvania * * *" (R. 58).

The final judgment of the Supreme Court of Pennsylvania was:

> "The judgment is reversed and the indictment quashed" (R. 63).

The opinion of the Mr. Justice Jones, refers to questions of trial error and proof but does not discuss or make any adjudication of the same. Mr. Justice Jones said:

> "But, with any or all of that, we need not now be concerned * * *" (R. 53).

Therefore, propriety of the order quashing the indictment is the only question involved in this case.

The indictment clearly alleged acts directed against the Commonwealth of Pennsylvania. The first count alleged that within the County of Allegheny, Pennsylvania, Respondent engaged in certain conduct with a view of overthrowing and destroying by force the "Government of this State and of the United States" (R. 9). Similar allegations as to overthrowing by force and violence the Commonwealth of Pennsylvania as well as the United States were made in counts following (R. 11, 12, 15, 16).

In the counts appearing on pages 15 and 16, the indictment quotes from certain publications and alleges that the language therein "refers to this Commonwealth and the United States" (R. 15). Among the passages quoted in the indictment are statements that the dictatorship of the proletariat cannot arise as a result of the peaceful development, but can only arise as a result of the smashing of the bourgeois state machine, and that the replacement of the bourgeois by the proletarian state is impossible without a violent revolution. No one of these charges is limited to acts against the United States only. In a number of counts the Commonwealth of Pennsylvania is specifically named. In the other counts the allegation is general and applies to both governments.

In addition, there was evidence of acts by the defendant against the Commonwealth of Pennsylvania, as well as the United States. An attempt to overthrow the government of the United States would begin with and involve the overthrow of the government of the state. It would not and could not be limited to the government of the United States. One of the first steps would be to seize and destroy property of strategic and military value, such as munition plants, arsenals, navy yards, railroads, airports and public utilities. All of these Pennsylvania has in unusual quantities. If the effort of revolt pro-

gressed, vast destruction of human life and property would be inevitable. This would work a plain violation of the laws of Pennsylvania and a direct injury to the people thereof. *All this would be accomplished by acts done in Pennsylvania.* Nelson was selling, in Pittsburgh, Pennsylvania, printed matter advocating the overthrow of government. The literature was not limited to the government of the United States (R. 701, 706). He directed the plan of the Communist party to infiltrate into steel and other basic industries in Pittsburgh, and assigned himself to the job of infiltrating into the plants of the Westinghouse Electric and Machine Company engaged in the manufacture of war defense equipment and material in Pittsburgh (R. 702).

Respondent was assigned as district organizer of the Communist party in Pittsburgh and in an address stated that the National Board of the Communist Party recognized the importance of Pittsburgh because such basic industries as the United States Steel Company were located there and, therefore, the board was sending one of its best organizers there, Steve Nelson, to take the job of organizer in that district, and was sending Andy Onda to take charge of the steel contact work for the party.

On May 29, 1950, respondent Nelson telegraphed to Eugene Dennis, General Secretary of the Communist party, as follows:

> "Night-Letter, May 29, 1950.
>
> "Eugene Dennis, Federal House of Detention
> 427 West Street, New York City, New York
>
> "Western Pennsylvania Party Conference to launch crusade for peace and building workers circulation sends you warmest greetings circulations sends you warmest greetings. Recruited five workers for basic industry for for the goal of 25 in the campaign named in your honor. Conference pledged recruiting remaining 20 by July 16. Further pledge to make real

drive for peace and develop mass circulation of Worker, pledge to be worthy of example you set as champion fighter for peace in U. S. A. Wish you best of health and will fight for your earliest return.

Signed. Steve Nelson" (R. 310).

At the date of this telegram, Eugene Dennis was in prison and his conviction was later upheld in *Dennis* v. *United States*, 341 U. S. 494.

Matt Cvetic, who was specially assigned by the Federal Bureau of Investigation to ascertain the aims of the Communist party of Western Pennsylvania, testified that at a meeting at the "Culture Center" on Forbes Street, Pittsburgh, Steve Nelson made a report to the Communist party members present there and read from a book a statement that the Bolsheviks supported wars to liberate the people from capitalistic slavery (R. 707).

IV.

(*A*) RESPONDENT'S ARGUMENT THAT THE INDICTMENT IS VAGUE AND UNCERTAIN IS NOT SOUND.

Under the Pennsylvania law an indictment may allege an offense in the language of the statute. The remedy of the defendant is to ask for a bill of particulars to furnish details. The rule is authoritatively stated in Sadler's Criminal Procedure in Pennsylvania (2 ed.) 358, as follows:

"Since the passage of the criminal procedure Act of 1860, by which it was made sufficient to charge offenses substantially in the words of the act of assembly, numerous cases have arisen in which the defendant has moved to quash for insufficiency of description. The courts have uniformly held in such cases that this is not ground to quash, though a bill of particulars may be asked for, which in a proper case the court will order."

(*B*) FAILURE TO ALLEGE INTENT IN CERTAIN COUNTS OF THE INDICTMENT DOES NOT RENDER SUCH COUNTS INVALID.

In support of his argument, Respondent cites *Dennis* v. *United States*, 241 U. S. 494, 500 (1951).

The Smith Act uses the words "knowingly or wilfully advocating" and definitely makes this intent an element of the crime. In the *Dennis* case, this court held that as intent was a part of the crime, intent must be proved.

This court, however, did not hold that a conviction under a statute which did not make intent an element of the crime, would amount to a denial of due process of law.

As was stated by Mr. Chief Justice Taft in *United States* v. *Balint, et al.*, 258 U. S. 250:

> "It has been objected that punishment of a person for an act in violation of law when ignorant of the facts making it so, is an absence of due process of law. But that objection is considered and overruled in *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, 69, 70, in which it was held that in the prohibition or punishment of particular acts, the state may in the maintenance of a public policy provide 'that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance'" (252).

However, what the Pennsylvania Sedition Law prohibits is inciting or advocating the overthrow of the government by force or violence. Such acts of inciting or advocating are not accidental or unintentional. The intent may be implied from the doing of the acts themselves.

(*C*) THE PHRASE BRING THE GOVERNMENT INTO HATRED OR CONTEMPT HAS NOT BEEN CONSTRUED BY THE SUPREME COURT OF PENNSYLVANIA.

As stated in the note in the majority opinion (R. 51-52) neither the Supreme nor Superior Courts has

interpreted this word nor passed upon the constitutionality of Section (c) of the Pennsylvania Sedition Act.

We respectfully submit that this court should not pass upon the constitutionality until the statute has been interpreted by the Supreme Court of Pennsylvania.

The ruling that the Pennsylvania statute was superseded made it unnecessary for the Supreme Court of Pennsylvania to pass upon the constitutionality of Section (c).

V.

The only point decided by the majority of the Supreme Court of Pennsylvania was that the Smith act superseded the Pennsylvania sedition law. The opinion of Mr. Justice Jones referred to other questions but did not discuss or make any adjudication of the same. Mr. Justice Jones said:

> "But, with any or all of that, we need not now be concerned. * * * (R. 53).
>
> "The judgment is reversed and the indictment quashed" (R. 63).

The brief for respondent says:

> "The errors in the trial (and there were many) need not be noted at this time as they are not presented to the court on this writ" (R. 8).

Nevertheless in the Statement of Facts, counsel for the respondent argues that Nelson was compelled to proceed to trial without counsel although Nelson had contacted through mail or otherwise "700 lawyers in Pittsburgh and personally spoke to 40". Counsel for respondent apparently makes this argument in support of his contention that only Federal Courts should try cases in sedition.

Nelson was arrested on October 31, 1950 and Nelson, Onda and Dolsen were indicted under the Pennsylvania sedition act and their trial together began on January 12, 1951 (R. 1).

Prior to the trial, Nelson had been represented by John T. McTernan of the bar of California and by Hymen Schlesinger of the bar of Allegheny County, but on January 12, 1951 when the trial began, Nelson terminated the services of both of these lawyers and voluntarily continued without counsel, defending himself.

In May, Nelson was injured in an automobile accident and on May 22, 1951, he was granted a severance and the case, as to him, was continued (R. 21).

A separate and second trial was listed in early October, 1951 for Nelson, but on application of Nelson was postponed to December 3 on account of the condition of his health resulting from an accident.

The court, however, permitted Nelson to go to New York, Reading and Philadelphia to secure counsel, but informed him that inability to get counsel would not be accepted as a reason for further postponements (R. 96-100).

The case was then listed for trial on December 3, 1951. Nelson presented a petition asking the court to appoint a panel of lawyers whom he might interview. Judge Montgomery, who later presided in this second trial, personally undertook to find lawyers who would be willing, at the request of the court, to represent Nelson and suggested four members of the Allegheny County Bar, including Mr. Glick and told Mr. Glick that he would grant a postponement of five days to permit the latter to familiarize himself with the case.

Nelson objected that he was being forced to go to trial without adequate preparation (R. 99).

Judge Montgomery informed Nelson that if he did not accept one of the lawyers suggested that Nelson should select someone else, and that if he, Nelson, did not

see fit to select one of the lawyers suggested or anyone else, the judge would appoint counsel to sit by Nelson and advise him of his rights, and reminded Nelson that Nelson had had an opportunity to talk to lawyers during the two months' postponement and had driven to New York, Reading and Philadelphia (R. 101, 126).

On December 5, 1951, Nelson presented an affidavit in which he stated that due to the accident, he had not the physical strength and the full control of his faculties to try this case himself (R. 104). Judge Montgomery reminded Nelson that during the discussion of appointment of counsel, Nelson had made no mention of his health. Judge Montgomery also reminded Nelson that he had been in court a dozen times since the judge had granted him a postponement of two months (R. 105).

The Assistant District Attorney also informed the court that although the case had been postponed from early October to December 3, defendant had not come in with a medical excuse until the morning of December 5 (R. 105).

Judge Montgomery informed Nelson that he would delay the case until Dr. Wagner and Dr. Weinberg (who had furnished the medical certificate for the postponement in early October) could make a present examination of Nelson. Nelson agreed to an examination by Dr. Wagner and Dr. Weinberg (R. 110). Dr. Wagner examined Nelson and reported to the court that Nelson was physically able to proceed with the trial (R. 121). Dr. Weinberg suggested that a special test be made by Drs. Rowe and Bragdon (R. 121). Judge Montgomery continued the trial for five days to permit the test (R. 128).

On December 7, the report of the test was received. It was negative as to any fractures or concussions or any mental or nervous disturbances from the accident (R. 133-134). On December 17, Nelson then made a motion to disqualify Judge Montgomery (R. 135) which was

refused (R. 138) and then made a motion for a change of venue which was refused (R. 138) and also a motion that the court appoint an attorney to assist him (R. 138).

On December 6, Judge Montgomery had informed Nelson that Mr. Glick was in attendance and had volunteered to attend Nelson as attorney at the request of the court but that Glick had informed the court that Nelson did not desire his assistance or presence (R. 129).

On December 17th Nelson asked the court to appoint an attorney to assist him "irrespective of my responsibility of the financial matter" (R. 138).

The court informed Nelson that he would not appoint counsel as Nelson had the means to engage counsel himself and further informed Nelson that he had had ample opportunity to engage counsel (R. 138).

Judge Montgomery had also informed Nelson that he could renew and use in this second trial; written motions which had been presented at the beginning of the first trial (R. 108).

This was done and the court denied motions for continuance because of lack of counsel, for change of venue, appointment of attorney and to quash the indictment and to dismiss the jury panel (R. 138, 140, 144).

Judge Montgomery also gave Nelson a choice of two jury panels and provided for Mr. Blenchfield to aid Nelson in selecting a jury and when Nelson objected to Mr. Blenchfield, assigned Mr. Connor to do this (R. 144-147).

The respondent, Nelson did not take the stand as a witness at all and thereby avoided any questions by the prosecution as to his actions or conduct; instead, he made lengthy addresses to the jury. His opening address covers 30 printed pages (R. 880-910). His closing address covers 76 printed pages (R. 1240-1315). His remarks were a brazen attempt to inflame the minds of the jurors against the prosecution and to distract their minds from his own conduct. None of these remarks had any relevancy to the case, and he did not discuss the testimony nor the pain-

phlets which he was selling and distributing and copies of which had been offered in evidence.

Nelson displayed very exceptional skill for a layman in objecting to testimony, making motions to strike out testimony and cross examining witnesses.

He repeatedly ignored orders of the trial judge not to yell at witnesses (R II—822, 823, 843); called a witness a liar or accused him of lying (R I—741, 742, 747); injected remarks in the hearing of the jury after the trial judge had excluded the matter (R. 2, 839, 842).

We quote a few illustrations of the remarks by Nelson in the hearing of the Jury:

> "Mr. Nelson:—I think, your Honor, it is closing a very important avenue of showing the credibility of this person. He's a disreputable character although he manages to put on a halo of a saint at present, and I want to show he is nothing more than a cheap racketeer" (Vol. I, p. 739):
>
> "Mr. Nelson:—* * * How are you going to expose this rat unless you say it's a record of the Court in this City" (Vol. II, p. 847);
>
> "Mr. Nelson:—Is it true or is it not true, Mr. Cvetic, that you had dinner at a restaurant, right across the street from the William Penn Hotel, known as Naple's Restaurant, with a girl friend not long ago——
>
> "Mr. Cercone:—That is objected to as it covers the same——
>
> "Q. And you pulled a gun on her and witnesses had to stop you. Isn't that true?
>
> "The Court:—Objection sustained."
>
> "Mr. Nelson:—Well, your Honor, you closed the door on a very important piece of examination" (Vol. II, p. 849).
>
> "Mr. Nelson:—Were you sued two times by your wife for non-support?

"Mr. Cercone:—That is objected to.

"The Court:—Objection sustained. Don't repeat the question when the objection has been sustained, Mr. Nelson.

"Mr. Nelson:—Your wife had to raise your two kids" (Vol. II, page 839).

"Mr. Nelson:—You know somebody else cooked that up for you; you don't have it in your head to figure that out" (Vol. II, page 779).

Respectfully submitted.

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